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In the Supreme Court of the United States

OCTOBER TERM 1974

No. 74-38

DAVID T. YOKOZEKI, *Petitioner*,

vs.

STATE BAR OF CALIFORNIA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California

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Subject Index

	Page
Decisions below	1
Jurisdiction	2
Question presented	3
Constitutional provision involved	3
Statement of the case	3
Argument	8
I. The right to practice law is a valuable property right	8
II. Repeated but vain insistence upon right to be heard does not constitute waiver as defined by this court	9
III. California's order suspending petitioner is in flagrant violation of the due process guarantees of the Fourteenth Amendment	10
IV. A charge of invasion of constitutional liberties in California is entitled to searching inquiry when made by one of Oriental extraction	12
Conclusion	16

Table of Authorities Cited

Cases	Pages
Alkow v. State Bar (1971) 3 Cal.3d 924	6
Barker v. Wingo (1972) 407 U.S. 514	9
Barreiro v. State Bar (1970) 2 Cal.3d 912	6
Chronicle Publishing Co. v. Superior Court (1960) 54 Cal. 2d 548	2
Goldberg v. Kelley (1970) 397 U.S. 254	11, 12
Grannis v. Ordean, 234 U.S. 385	10
Greene v. McElroy (1959) 360 U.S. 474	11
Neblett v. State Bar (1941) 17 Cal.2d 77	8
Peo. v. Brady (1870) 40 Cal. 198	13
Wilson v. State Bar (1958) 50 Cal.2d 509	6
Woodard v. State Bar (1941) 16 Cal.2d 755	8

Codes

California Business and Professions Code: Pages
Sections 6040 et seq. 4
Section 6075 2
Section 6077 2
Section 6081 7
Section 6082 7
Section 6083 7
Section 6086.5 6
Section 6087 4
Section 6100 2

Constitutions

United States Constitution:
Fourteenth Amendment 3, 7, 8, 10, 12, 16
Fourteenth Amendment, Section 1 3

Rules

Rules of Procedure:
Rules 14.2, 14.7, 16 5
Rule 25 4
Rule 26 5
Rule 38 et seq. 6
Rule 80 et seq. 6

Statutes

28 U.S.C. Section 1257(3) 2

Texts

M. Grodzins, Americans Betrayed 123 (1949) 15
B. Hosokawa, Nisei: The Quiet Americans 81 (1969) 14, 15
McWilliams, 66-80; "Chink!" 1-269 (Cheng-Tsu Wu, ed. 1972) 14
C. McWilliams, Factories in the Field, 76 (1939) 13, 14
J. tenBroek, E. N. Barnhart, and F. W. Matson, Prejudice, War and the Constitution 25 (1954) 14

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Petitioner David T. Yokozeki respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California entered on May 6, 1974.

DECISIONS BELOW

The judgment of the court below, entered May 6, 1974, ordered petitioner, an attorney at law, suspended from practice for five years or until he makes restitution to an aggrieved client, whichever is the greater period. The court's opinion[1] approved the

[1]Copies of the Supreme Court opinion and of its order denying petition for rehearing, made June 5, 1974, appear in the Appendix.

findings of the Disciplinary Board of the State Bar of California,[2] but modified the Board's recommendation of disbarment to suspension.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
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> . . .
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

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[2]Grounds and procedure for discipline of California attorneys are provided in the Business and Professions Code, California Rules of Court, and Rules of Procedure of the State Bar of California. The State Bar, as an arm of the state Supreme Court, processes complaints, conducts administrative hearings and recommends discipline to the court, which alone has power to suspend or disbar duly admitted attorneys. *Chronicle Publishing Co. v. Superior Court* (1960) 54 Cal.2d 548; CAL. BUS. & PROFS. CODE §§6075, 6077, 6100.

QUESTION PRESENTED

Does a state's order suspending a member of its Bar for a minimum of five years, after a hearing at which he was not present or represented by counsel and did not waive these rights, violate the due process clause of the Fourteenth Amendment?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment Fourteen, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner was admitted to the California Bar in 1952. In 1970 a former client, Dr. Chang Ha Kim, complained to the State Bar that petitioner had converted the doctor's property to his own use in 1963, seven years before.[3] Petitioner had departed Califor-

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[3]No other complaint against petitioner was made in the 22 years since his admission.

nia in 1969 to live in Japan. He subsequently moved to Guam while these proceedings on Dr. Kim's complaint were pending.

Notice to Show Cause[4] was served on petitioner in Japan on December 25, 1971. Petitioner promptly acknowledged the Notice, advising the State Bar by letter that "I will be unable to appear personally on March 22, 1972 at the date set, for physical and financial reasons. . . ." He answered the Notice a few days later, denying its material allegations, and again telling the State Bar in a letter of transmittal that " . . . my limited resources . . . will preclude my attending the hearing on this matter."

The matter was then handled by a succession of hearing committees[5] which considered a number of ways to conduct the matter in petitioner's absence. The last such committee, rejecting a procedure approved both by petitioner and a predecessor committee, adopted a new plan on August 21, 1972; a plan that understandably had already been rejected by petitioner: it provided that petitioner would be sent a list of adverse witnesses; it allowed him to prepare cross-examination questions for each witness from the list alone, without direct examination, and to send the questions to the committee to be propounded by its members upon completion of direct examination.

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[4]Formal disciplinary proceedings are commenced with a complaint known as Notice to Show Cause (Rule 25, Rules of Procedure; CAL. BUS. & PROFS. CODE, foll. §6087.)

[5]Known as local administrative committees (CAL. BUS. & PROFS. CODE §§6040 et seq.).

The committee, adopting this unique plan notwithstanding petitioner's prior rejection of it, also "strongly [recommended] that [petitioner] obtain the services of counsel to protect his rights at the formal hearing". No doubt the committee recognized the presence of counsel would afford meaningful cross-examination.

Petitioner agreed with the recommendation, sought and obtained a continuance of the hearing until February 26, 1973[6] to obtain counsel and prepare, and told the committee and State Bar exactly how he intended to proceed.

Handicapped by distance (petitioner had moved from Japan to Guam), and by inaccurate recollection of the address of William J. Bluestein, the attorney he told the Bar he wanted to engage,[7] petitioner did not send Mr. Bluestein his requested $500.00 retainer from Guam until February 20, 1973.

Although petitioner cabled Mr. Bluestein it was coming, the money did not arrive in Los Angeles until February 26, the day of the hearing. Bluestein attempted to call the Examiner[8] and the State Bar's assistant secretary on the morning of the 26th, but was unable to reach either. He did not appear, and

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[6]The only continuance requested by petitioner. Prior delays were at the request of the State Bar or its committees.

[7]Petitioner initially wrote to Bluestein at 130 So. Beverly but the correct address was 130 So. Robertson, both addresses in Beverly Hills.

[8]The attorney representing the State Bar, deemed to be the plaintiff in formal disciplinary proceedings, is known as Examiner. (Rules 14.2, 14.7, 16, 26, Rules of Procedure, CAL. BUS. & PROFS. CODE.)

formally advised the State Bar he had been retained two days later.

The committee made no attempt to reach Mr. Bluestein, heard the adverse witnesses, received in evidence all the letters petitioner had written to the Bar—dealing interchangeably with procedure and the merits—and closed the hearing at which petitioner was not present nor represented by counsel.

The committee, in due course, found against petitioner on all issues and recommended that he be suspended for five years.

As soon as he learned of the committee action, petitioner immediately moved the Disciplinary Board[9] for hearing de novo or, alternatively, to reopen the hearing to take additional evidence, expressly as provided by Rule 39.1, Rules of Procedure.[10]

At its June, 1973 hearing, the Disciplinary Board heard Mr. Bluestein, who did appear there, urge these motions on behalf of petitioner, and make a further motion for a continuance to the Board's September meeting to permit petitioner to appear in person before the Board. The Board denied all motions summarily, affirmed the committee findings, and recommended to the court below that petitioner be disbarred.

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[9]A hearing committee's report and recommendation goes to the Disciplinary Board for review (CAL. BUS. & PROFS. CODE §6086.5; Rule 38 et seq., Rules 80 et seq., Rules of Procedure).

[10]See *Alkow v. State Bar* (1971) 3 Cal.3d 924; *Wilson v. State Bar* (1958) 50 Cal.2d 509, and *Barreiro v. State Bar* (1970) 2 Cal. 3d 912, for examples of generous relief from neglect and default afforded under this rule to other lawyers charged with misconduct.

The Board filed its report and recommendation to the court below and petitioner timely sought review by the court. CAL. BUS & PROFS CODE §§6081, 6082, 6083).

Upon the showing made, the court below concluded that petitioner "at all times was afforded the opportunity to appear and to appear with or by counsel; his election not to do so constitutes a waiver of any claims of irregularity he now urges."

The "claims of irregularity" urged by petitioner in the court below included the charge that the State Bar had deprived him of valuable property without due process in violation of the Fourteenth Amendment.

The court below, having concluded that petitioner waived his right to be heard in person and by counsel, further concluded that, in a complex transaction had in 1962 and 1963, petitioner, as charged, obtained title to Dr. Kim's properties by falsely promising to hold title in trust for the doctor, and then converted them to his own use by pledging the property to Bank of Tokyo to secure his own loans. Petitioner's version, suggested in correspondence but never heard as evidence by the State Bar, was that Dr. Kim knowingly exchanged his property interests for interests in certain movie rights controlled by petitioner.

The court below ordered the suspension of petitioner from practice for five years or until petitioner makes restitution to Dr. Kim, presumably of the $14,000 Dr. Kim testified he paid Bank of Tokyo to have his property restored.

There is no question petitioner has been deprived of property. He urges the deprivation has been accomplished by California without due process, in contravention of the Fourteenth Amendment.

ARGUMENT

I. THE RIGHT TO PRACTICE LAW IS A VALUABLE PROPERTY RIGHT

California acknowledges that the right to be an attorney, once acquired, is a valuable property right. It cannot be suspended or revoked except on charges alleged and proved, and as to which full notice and opportunity to defend has been accorded. *Woodard v. State Bar* (1941) 16 Cal.2d 755.

California has gone further, and has held this valuable property right "should not be taken away or cancelled under circumstances that have even the slightest tendency to suggest any possible unfairness or disadvantage therein to the attorney whose right to remain in his profession is challenged". *Neblett v. State Bar* (1941) 17 Cal.2d 77, 80.

The State Bar's brusque and summary rejection of petitioner's repeated requests to be fairly heard cannot be squared with the state's express acknowledgment that petitioner's valuable property is at stake.

II. REPEATED BUT VAIN INSISTENCE UPON RIGHT TO BE HEARD DOES NOT CONSTITUTE WAIVER AS DEFINED BY THIS COURT.

Petitioner constantly expressed to the State Bar his interest in and concern with the proceeding against him. He consistently undertook to defend against the charges, within the limits of his economic ability to do so from 8,000 miles away.

Petitioner sought counsel to represent him from the moment his judges strongly urged him to do so, a recommendation they made upon rejecting a previously-approved procedure by which petitioner believed he could protect himself without counsel. He paid his selected attorney, tardily perhaps, but virtually within minutes of the time the hearing began. Petitioner promptly, actively and vigorously demanded hearing de novo, reopening for additional evidence and a continuance to appear in person, as soon as he learned of the first decision against him.

Contrary to the finding of waiver by the court below, petitioner's described conduct fails entirely to constitute a waiver, as defined by this Court, of his constitutional right to that notice and hearing to which due process entitles him.

Petitioner's conduct cannot be found within the definition of waiver [of a constitutional right] made by the Court in *Barker v. Wingo* (1972) 407 U.S. 514, where the Court said:

> "The Court has defined waiver as 'an intentional relinquishment or abandonment of a known right or privilege'. *Johnson v. Zerbst* (1938) 304 U.S. 458. . . . Courts should 'indulge every reasonable

> presumption against waiver,' *Aetna Ins. Co. v. Kennedy* (1937) 301 U.S. 389, . . . and they should 'not presume acquiescence in the loss of fundamental rights', *Ohio Bell Tel. Co. v. Public Utilities Comm'n* (1937) 301 U.S. 292, ... The Court has ruled similarly with respect to waiver of other rights designed to protect the accused."

There is no support in the record whatever for the finding of California's court that petitioner waived his fundamental right "to appear and to appear with or by counsel", his right to be heard in his own defense.

III. CALIFORNIA'S ORDER SUSPENDING PETITIONER IS IN FLAGRANT VIOLATION OF THE DUE PROCESS GUARANTEES OF THE FOURTEENTH AMENDMENT.

In 1914 this Court described "[t]he fundamental requisite of due process of law" as " . . . the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385. California's complete refusal, by its State Bar and Supreme Court, to afford petitioner this basic element of due process requires review and reversal by this Court.

At the critical hearing, where hostile witnesses are heard and adverse evidence received, due process requires the right to appear by the accused, in person or by counsel. That right to be heard was arbitrarily denied to petitioner. None pretends that various letters and motions, marked in evidence at the hearing, achieved the stature of a due process right to be heard.

The Court has recognized the inadequacy, from a due process standpoint, of appearance by documents alone. In *Goldberg v. Kelley* (1970) 397 U.S. 254, 269, the Court said:

> "[W]ritten submissions do not afford the flexibility of oral presentation; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important."

The opportunity to assess the interests of the decision maker is not all that is lost with the right to be heard. The right to confront and cross-examine adverse witnesses is obliterated as well.

The right to cross-examine is of singular importance to this petitioner. He consistently challenged the veracity of Dr. Kim, who complained and testified against him, asserted that other witnesses were under the domination of Dr. Kim and even suggested that Dr. Kim might produce spurious witnesses.

The constitutional requirements of procedural due process, under these circumstances, particularly require confrontation and the opportunity to cross-examine. In *Greene v. McElroy* (1959) 360 U.S. 474, 496, the Court said, and repeated the language in *Goldberg v. Kelley, supra* at 270:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important

> in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment *** This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, *** but also in all types of cases where administrative *** actions were under scrutiny."

The Court added in *Goldberg:*

> "[P]articularly where credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for decision."

California's denial of petitioner's right to due process was complete, and disastrously prejudicial. The decision of the court below dilutes the due process clause of the Fourteenth Amendment beyond recognition in California, at least as applied to one named Yokozeki.

IV. A CHARGE OF INVASION OF CONSTITUTIONAL LIBERTIES IN CALIFORNIA IS ENTITLED TO SEARCHING INQUIRY WHEN MADE BY ONE OF ORIENTAL EXTRACTION.

A long and shameful history of mistreatment of Chinese and Japanese minorities in California warrants the Court's close scrutiny of David Yokozeki's claim to denial of due process by the State Bar of

California. History deprives an order suspending Yokozeki for five years of a presumption of regularity.

California has subjected its citizens and residents of Oriental ancestry to every conceivable form of abuse and degradation since they were first brought to the state in substantial numbers, generally to perform menial labor. The State Constitution of 1879 devoted an entire article to anti-Chinese provisions. Chinese were forbidden employment on public works or by corporations. The legislature was empowered to authorize cities and towns to exclude Chinese or to pen them up in designated areas. School districts were authorized to establish segregated schools for Chinese children. Anti-Chinese sentiment pervaded the state. The California Supreme Court upheld a statute prohibiting Chinese from testifying in court against white men (*Peo. v. Brady* (1870) 40 Cal. 198). Special taxes and onerous restrictions were levied on Chinese engaged in mining, fishing or operating laundries. During the late 19th century, racial hatred against the Chinese manifested itself in violent pogroms throughout the state. Chinese were beaten and terrorized, their homes looted and burned, and their communities dispersed. McWilliams has described contemporary accounts of "the purple-coated celestial-heathens" fleeing an "aroused citizenry".[11] A California Attorney General said "I believe the Chinese have

[11] C. McWilliams, *Factories in the Field*, 76 (1939) [hereinafter cited as McWilliams].

no souls to save, and if they have, that they are not worth the saving".[12]

Citizens and residents of Japanese ancestry fared no better in California. The stage had already been vividly set with California's reaction to the "Yellow Peril".[13] The later arrivals from Japan merely provided "a tail to the anti-Chinese kite".[14] The two races were so constantly lumped together in speeches, resolutions and articles that California Japanese were inspired in 1901 to publish leaflets demanding to be recognized as distinct from the Chinese.[15] In 1906, the San Francisco Board of Education attempted to transfer Japanese children from public schools to the already segregated Chinese schools.

Anti-Japanese societies sprang up overnight throughout the state and at their urging, the legislature considered scores of discriminatory measures aimed at the Japanese. In 1905, the State Legislature

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[12]McWilliams, *supra*, 66-80; *"Chink!"* 1-269 (Cheng-Tsu Wu, ed. 1972).

[13]J. tenBroek, E. N. Barnhart, and F. W. Matson, *Prejudice, War and the Constitution* 25 (1954) [hereinafter cited as tenBroek].

[14]B. Hosokawa, *Nisei: The Quiet Americans* 81 (1969) [hereinafter cited as Hosokawa].

[15]"An especially lurid comparison was drawn by the San Francisco journal *Organized Labor* in a 1900 editorial:

> 'Chinatown with its reking filth and dirt, its gambling dens and obscene slave pens, its coolie labor and bloodthirsty tongs, is a menace to the community; but the snivelling Japanese, who swarms along the streets and cringingly offers his paltry services for a suit of clothes and a front seat in our public schools, is a far greater danger to the laboring portion of society than all the opium-soaked pigtails who have ever blotted the fair name of this beautiful city.' "

from tenBroek, *supra* at 24.

unanimously adopted a resolution urging Congress to halt Japanese immigration. The Alien Land Law, enacted in 1913, prohibited Japanese from owning real property in California for nearly forty years.[16]

The smoldering fires of racial hatred against California citizens of Japanese extraction again burst into flame at the outset of World War II. In January of 1942, the California Senate passed a resolution requesting the State Personnel Board to prevent persons "not loyal to the United States"[17] from obtaining Civil Service employment, a measure which culminated shortly thereafter in the summary dismissal of all state employees of Japanese ancestry.

Early in the war, the federal government ordered the evacuation and confinement of all Japanese and Japanese-Americans on the West Coast in facilities the government described euphemistically as Assembly and Relocation Centers. The exile lasted three years.

Not content with drastic and cruel federal action, Californians drove further nails into the coffin. Returning evacuees found their farms and orchards neglected and ruined, their homes and businesses ransacked—if they were lucky enough to still own them.[18]

Fraud and double-dealing more frequently marked treatment of evacuated Japanese-Americans. Keisaburo Koda was bilked of 4,000 acres of rice land in

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[16]*Id.* at 24-67.

[17]M. Grodzins, *Americans Betrayed* 123 (1949).

[18]Hosokawa, *supra* at 437.

the San Joaquin Valley by his attorney and others who took charge of his affairs when he was removed.[19]

In the wake of this sorry legend, stripping petitioner of his livelihood for five years after a hearing at which he was not present or represented by counsel appears as a deprivation of rights and property not unprecedented in California. It is equally indefensible, a gross violation of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to the Supreme Court of California and that, upon review, that court's judgment of May 6, 1974, suspending petitioner be reversed and remanded.

Dated, San Francisco, California,
July 24, 1974.

Respectfully submitted,
BENJAMIN DREYFUS,
Counsel for Petitioner.

(Exhibits Follow)

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[19] *Id.* at 446.

Exhibit A

In the Supreme Court of the
State of California
In Bank

L.A. No. 30,194

David T. Yokozeki,
Petitioner,
vs.
The State Bar of California,
Respondent.

[Filed May 6, 1974]

BY THE COURT

This is a proceeding to review a recommendation of the Disciplinary Board of the State Bar (Board) that petitioner, a member of the State Bar, be disbarred from the further practice of law. The Board's recommendation is based on findings by a local administrative committee of the State Bar that petitioner converted to his own use an apartment building and a note secured by a trust deed on the residence of a client, contrary to the purposes for which these assets had been transferred from the client to petitioner.[1] Although the committee's findings were

[1]Petitioner, by his conduct, is alleged to have violated his oath (Bus. & Prof. Code, § 6067) and duties (§ 6068) as an attorney and counselor at law. Such conduct would constitute cause for disbarment or suspension (§ 6103). Specifically, he is charged with wil-

adopted in substance by the Board, its recommendation of disbarment is harsher than the committee's recommendation that petitioner be suspended from the practice of law for a five-year period.

Petitioner contends that: (1) the evidence is insufficient to support the findings; (2) he was denied a reasonable opportunity to present his case before the Board; (3) he was prejudiced by his former client's seven-year delay in the filing of the complaint with the State Bar and thereafter by the tardiness of the State Bar in processing the complaint; and (4) disbarment is an inappropriate sanction under the circumstances.

We reject the first three of these contentions. We decline, however, to follow the Board's recommendation of disbarment. Instead, we order that petitioner make restitution to his former client and that he be suspended from the practice of law for five years or until he has made full restitution, whichever is the greater period.

Petitioner was admitted to practice in California in 1952. He has no prior record of discipline. In early 1962 Dr. Chang Ha Kim consulted petitioner in connection with a medical malpractice suit which pos-

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fully violating rule 4 of the Rules of Professional Conduct and the commission of acts involving moral turpitude and dishonesty. Rule 4 provides that "A member of the State Bar shall not acquire an interest adverse to a client." A wilful breach of the rule subjects a member of the State Bar to reproval or suspension for a period not to exceed three years. (§ 6077). The commission of acts involving moral turpitude or dishonesty subjects a member to suspension or disbarment. (§ 6106).

Unless otherwise specified, all statutory references are to sections of the Business and Professions Code.

sibly exposed the client to personal liability beyond any insurance coverage. Petitioner accepted a $2,000 retainer, filed pleadings in a separate declaratory relief action,[2] and suggested that Kim protect his assets by transferring the same to To-Yo, Incorporated, a corporation controlled by petitioner, to be held pending the outcome of the malpractice suit. Kim and petitioner agreed to the transfers and in order to give the transaction the appearance of propriety Kim was to receive from To-Yo, in exchange for his assets, certain film rights which both he and petitioner knew were worthless. Accordingly, on February 12, 1963, Kim conveyed to the corporation his interest in an apartment building and delivered a promissory note in the amount of $55,000, which note was secured by a deed of trust to Kim's personal residence. Petitioner, on behalf of the corporation, executed a separate writing which contained a promise to return the real estate and the note secured by the deed of trust to Kim on an unspecified date in 1963.

In early 1963 petitioner, without Kim's knowledge or consent, caused To-Yo to execute and deliver to the Bank of Tokyo a deed of trust to Kim's apartment building and an assignment of the note and deed of trust to Kim's residential property. The documents were delivered to the bank in order to secure pre-existing notes on which the corporation and petitioner were obligated.

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[2]Kim's purported insurer had filed a complaint for declaratory relief, alleging that Kim was not covered against the malpractice claim. Kim was represented by attorneys other than petitioner in the malpractice action.

In early 1964 the Bank of Tokyo attempted to collect the note and threatened to foreclose on Kim's home. Kim confronted petitioner who requested additional time to "clear the matter up." After petitioner failed to act, Kim consulted another attorney who demanded an explanation from petitioner. Petitioner then acknowledged that he had assigned Kim's note and its security, and had delivered a deed of trust to the apartment building as collateral for bank loans to the financially distressed To-Yo. Petitioner promised to repay the loans to the bank and did in fact discharge part of the obligation, resulting in the retransfer of the interest in the apartment building to Kim late in 1964. However, petitioner failed to liquidate his remaining obligations or to induce the bank to return Kim's note and reconvey the deed of trust to Kim's home.

Kim sued petitioner and the Bank of Tokyo in early 1965 demanding cancellation of the note and reconveyance of the deed of trust securing the note. Kim's verified complaint alleged that petitioner had fraudulently induced him to transfer the properties and note by falsely promising to return them.

Petitioner filed an unverified answer denying the allegations of the complaint. Discovery proceeded through 1966. In 1968 Kim settled his differences with the bank whereby he paid the bank $14,000 in exchange for the return of the note and the reconveyance of the security interest to him.

Petitioner discontinued the practice of law in California and moved to Japan in October 1969. Two

months later, in December, a default judgment in the amount of $14,000 was entered in favor of Kim against petitioner. The judgment has not been satisfied.

Petitioner failed to appear or submit any testimony at hearings scheduled by the local administrative committee. Explanations of his conduct are gleaned from an affirmative defense asserted in his answer to the complaint and from his other communications to the State Bar. He claimed that there was no attorney-client relationship between him and Kim in connection with the transactions involving Kim's assets; that other attorneys represented Kim in the malpractice suit; that the transfer of assets was made pursuant to an investment by Kim in the To-Yo Corporation; and that Kim consented to the subsequent assignments for security purposes to the Bank of Tokyo. Petitioner was unclear as to the nature of the consideration received by Kim for this "investment." In his answer petitioner claimed that Kim was to receive film rights of a value equal to the value of the interests transferred to To-Yo. In one letter petitioner claimed that Kim was to receive a portion of the profits of the enterprise and at a later time asserted that Kim was given an assignment of film rights. Petitioner claimed that the venture failed due to a breach of a distribution agreement on the part of a third party and other defaults not attributable to him.

Petitioner conceded that he held some of Kim's assets until the malpractice suit was settled but

claimed that the properties thus involved were certain contractual rights to purchase tracts of desert lands. According to petitioner these assets were transferred to him, were held only upon the request of Kim without any charge or fee, and were retransferred upon Kim's request.

The committee made and the Board adopted findings that petitioner had misappropriated the deed to the apartment house, the note and the deed of trust covering Kim's personal residence.[3]

Sufficiency of Evidence

Petitioner initially contends that the evidence was insufficient to support the findings. Although we are not bound by the findings of the State Bar and must exercise our independent judgment on the weight and sufficiency of the evidence (Glickman v. State Bar (1973) 9 Cal.3d 179, 184; In re Fahey (1973) 8 Cal. 3d 842, 845; Bernstein v. State Bar (1972) 6 Cal.3d 909, 916), the findings nevertheless are entitled to great weight and petitioner has the burden of showing, in support of his contention, that they are not supported by substantial evidence (Schullman v. State Bar (1973) 10 Cal.3d 526, 529; In re Wright (1973) 10 Cal.3d 374, 377; In re Higbie (1972) 6 Cal.3d 562, 569). Petitioner fails to sustain this burden.

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[3]Findings are made which are consistent with the account of events set out in the text. In conclusion the committee found: "That [petitioner] converted the apartment building and the Trust Deed upon the residence of Dr. Kim to his own use and purposes contrary to the agreement between [petitioner] and Dr. Kim, and used said properties for his own purposes by transferring said properties to the Bank of Tokyo to secure a pre-existing indebtedness. . . ."

The record amply demonstrates petitioner misused the properties entrusted to him. Kim's testimony, particularly with respect to petitioner's proposal to hold Kim's properties until the malpractice suit was settled and also with respect to petitioner's guilty knowledge of the impropriety of the transfers to the bank, was corroborated by other witnesses. Additionally, the whole course of improper conduct is well demonstrated by documentary evidence. Petitioner's explanations, on the other hand, are implausible. His assertion that there was no attorney-client relationship between him and Dr. Kim when the transfers occurred is contradicted by the $2,000 check from Kim to petitioner "for retainer in the malpractice action" as well as by petitioner's signature as the attorney of record on the pleadings in the declaratory relief action. Petitioner's contention that the transfer of assets represented nothing more than an investment in the To-Yo Corporation is undermined by his conflicting explanations of Kim's participation as an investor. Petitioner's claim that Kim consented to the transfers of the properties to the Bank of Tokyo is rebutted by evidence relating to transactions in which the bank was involved.

Finally, petitioner appeared to be unwilling to have his credibility tested. He made no statement under oath in the civil suit against him commenced by Kim and suffered a default judgment rather than proceeding to trial. Although findings in a civil fraud suit are not binding on us in this proceeding (In re Wright, supra, 10 Cal.3d 374, 377), we can take judi-

cial notice of matters in a civil action which arise out of a course of conduct underlying the charges against an attorney in disbarment proceedings (Lee v. State Bar (1970) 2 Cal.3d 927, 941; see Eschwig v. State Bar (1969) 1 Cal.3d 8, 18). We note also that petitioner did not testify or subject himself to cross-examination in these proceedings.

It is manifest for the foregoing reasons that petitioner's attack on the sufficiency of the evidence is without merit and we adopt the findings of the committee. Although it is our duty to resolve all reasonable doubts in favor of an accused member of the bar in deciding whether a particular course of conduct involves moral turpitude (In re Fahey, supra, 8 Cal. 3d 842, 845-846), we are compelled to conclude on the findings that petitioner's acts do involve moral turpitude and constitute a violation of his oath and duties as an attorney. (See fn. 1, supra.)[4]

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[4]Even if we were to find in accordance with petitioner's explanations he would still be subject to disciplinary action. If we assume that Kim's transfers were in the nature of an investment in To-Yo, petitioner did not reveal the corporation's shaky financial status nor give Kim any written evidence of his investment. All business dealings between an attorney and client in which the attorney benefits are closely scrutinized for unfairness on the attorney's part (Eschwig v. State Bar, supra, 1 Cal.3d 8, 16; Magee v. State Bar (1962) 58 Cal.2d 423, 430-431) and attorneys have been disciplined for inducing clients to invest in enterprises without fully apprising them of the risks. (See Himmel v. State Bar (1973) 9 Cal.3d 16, 22-23; Clancy v. State Bar (1969) 71 Cal.2d 140, 148-151; Krieger v. State Bar (1954) 43 Cal.2d 604, 610-611.)
Furthermore, petitioner acknowledged that he held some of Kim's properties in trust "until the medical malpractice action was settled." Thus, by his own admission, petitioner participated in a scheme to defraud Kim's potential judgment creditors, which is a crime (Pen. Code, § 531), and a proper subject for disciplinary action (see Townsend v. State Bar (1948) 32 Cal.2d 592, 597-598).

Opportunity to Defend

Petitioner next contends that he was denied a reasonable opportunity to defend against the complaint. He now requests a hearing de novo or, alternatively, an opportunity to present additional evidence since he was not present nor represented by counsel at hearings scheduled by the committee. It appears, however, that petitioner did not avail himself of generous opportunities to prepare his defense, obtain counsel, and appear at the scheduled hearings. He is, accordingly, not entitled to relief.

Kim's complaint of unprofessional conduct was filed in June 1970. After a preliminary investigation a formal notice to show cause was served on petitioner in Tokyo on December 25, 1971. Hearing was set for March 22, 1972, so as to afford time for discovery proceedings. Petitioner filed a formal answer in early January 1972 and stated that he would be unable to attend the hearing in California because of the expense involved as well as his desire to fulfill commitments to do legal work in the South Pacific area and Japan.[5] Petitioner also requested an opportunity to take the deposition in Tokyo of a loan officer of the Bank of Tokyo. Accordingly, the hearing was continued to May 25, 1972.

On May 25, 1972, petitioner was still not ready to proceed as he had not completed his discovery. The

[5]Petitioner evidently was carrying out an extensive practice in the South Pacific. He claims to be a member of the firm of Crain, Rathbun & Shoecraft, the "oldest and most prestigious law firm in Guam and in the Trust Territory Islands of the Pacific" as well as "chief counsel" for many "international conglomerate firms."

committee decided that the procedure previously approved was too cumbersome and time consuming.[6] It referred the matter to another committee to formulate a more expeditious procedure. It was finally proposed that petitioner be sent a list of the names of adverse witnesses, that he prepare cross-examination questions for each witness on the list, and that such questions be propounded to the witnesses immediately after they completed their testimony on direct examination. Petitioner objected to this procedure since it forced him to prepare questions for cross-examination without prior knowledge of the witnesses' testimony on direct examination. The committee, however, approved this procedure at a meeting on August 21, 1972, and advised petitioner to obtain counsel to represent him at the formal evidentiary hearing which was set for November 2, 1972.

Although the State Bar promptly mailed a record of these proceedings to petitioner, he did not learn of these developments until early October since he had moved from Japan to Guam in July without notifying the State Bar of his new address. In late October he requested a continuance of the hearing stating that he had been unable to reach the attorney of his choice, Mr. William J. Bluestein.[7] On November 2,

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[6]The previous arrangement was for the State Bar to present its witnesses on direct examination and then send a transcript of the hearing to petitioner. Petitioner would next compose questions for cross-examination of these witnesses which would be sent to the State Bar to be propounded to the witnesses at a later hearing.

[7]Petitioner did not have Bluestein's correct address. The State Bar telephoned Bluestein for petitioner and advised the latter of the correct address of the attorney.

1972, the hearing was continued to February 26, 1973, to give petitioner an opportunity to obtain counsel and prepare. On November 9, 1972, the transcript of the proceedings of November 2 was mailed to petitioner along with a letter informing him that he was to retain counsel and be prepared for the hearing before February 26, 1973.

Petitioner was additionally warned that the hearing would proceed on February 26 whether or not he had arranged to be represented by counsel. Since Bluestein had told the State Bar that he was not petitioner's counsel and would *not* represent petitioner until a satisfactory fee arrangement had been negotiated, the November 9 letter of the State Bar also requested petitioner to inform the State Bar of the name of his attorney as soon as he was retained.

Although petitioner negotiated with Bluestein for a fee arrangement, he did not promptly forward the necessary funds to secure Bluestein's services. On January 4, 1973, Bluestein wrote petitioner asking for a $500 retainer and requesting an immediate reply so he would be able to inform the State Bar whether or not he would be representing petitioner. On January 9 the State Bar wrote petitioner confirming the date of the February 26 hearing and again warning him that he was expected to have counsel ready by that date. On January 17 petitioner informed the State Bar that he had not yet employed counsel since he had not raised the funds for a retainer. Petitioner did not forward the required sum

until February 20. Unfortunately, it did not reach Bluestein until the very date of the hearing at a time when it was too late to appear or to represent petitioner at the hearing. Although Bluestein called the offices of the State Bar on the date of the hearing, he was unable to contact the examiner who had already left to attend the hearing. Bluestein did not officially inform the State Bar that he represented petitioner until two days after the hearing had been completed.

The foregoing record discloses that petitioner had ample opportunity to prepare for the hearing. More than 14 months had expired from the time the notice to show cause had been served until the hearing was finally conducted. Petitioner was continually informed of the progress of the proceedings. Because he had repeatedly advised the State Bar that he would be unable to appear in person the committee had, in good faith, made reasonable efforts to afford him an opportunity to defend against the complaint under these difficult circumstances.

Proceedings before the State Bar are *sui generis,* neither civil nor criminal in character, and the ordinary criminal procedural safeguards do not apply. (Lewis v. State Bar (1973) 9 Cal.3d 704, 713-714; Bernstein v. State Bar, supra, 6 Cal.3d 909, 916; Eschwig v. State Bar, supra, 1 Cal.3d 8, 18.) A member of the State Bar has an obligation to appear at his disciplinary hearing and the hearing can properly proceed in his absence. (§ 6111; rule 32, Rules of Proc. of the State Bar; see Alkow v. State Bar

(1971) 3 Cal.3d 924, 933-934; Wilson v. State Bar (1958) 50 Cal.2d 509, 510-511.) A member of the bar has a duty to present any evidence he deems favorable to himself and a failure to do so may justify a denial of a motion for a rehearing for the purpose of presenting additional evidence. (Barreiro v. State Bar (1970) 2 Cal.3d 912, 925; see Alkow v. State Bar, supra, at pp. 933-934; Wilson v. State Bar, supra, at pp. 510-511; In re Vaughn (1922) 189 Cal. 491, 497-498.) Finally, a member of the bar has a responsibility to obtain counsel if he wishes to be represented at a hearing. (See Hyland v. State Bar (1963) 59 Cal.2d 765, 773-774.)

In light of the foregoing it is apparent that petitioner has no cause to complain of the procedures employed by the local committee. Although written submissions are no substitute for oral presentation (Goldberg v. Kelly (1970) 397 U.S. 254, 269), and cross-examination without the opportunity to hear the witnesses on direct examination is not as effective as cross-examination with such an opportunity, such procedures were necessitated by petitioner's repeated refusal to comply with his obligation to appear in California for the hearing. The procedures were a bona fide effort by the committee to honor petitioner's wishes not to appear in person and to conduct the hearing by alternative means. The committee's refusal to conduct the hearing in all respects as requested by petitioner is immaterial. Petitioner at all times was afforded the opportunity to appear and to appear

with or by counsel; his election not to do so constitutes a waiver of any claims of irregularity he now urges.[8]

The failure of petitioner to arrange to be represented by counsel at the hearing can be attributed only to his own defaults. Nearly six months elapsed from the time petitioner was told he should employ counsel until the time of the hearing in early 1973. Part of the delay was due to petitioner's failure to give his forwarding address to the State Bar and part was due to petitioner's lack of diligence in arranging for payment of the retainer fee.[9] His entire course of conduct in responding to the order to show cause reveals a lack of concern for the seriousness of the charges and a misunderstanding of the real priorities in the assignment of his time, effort and energies to the problems confronting him.

Delay in Filing and Processing Complaint

Petitioner also urges that the complaint should be dismissed as he was prejudiced by the seven-year de-

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[8]Petitioner makes other contentions associated with his claim of the inadequacy of proceedings. He thus complains that he did not receive copies of certain documents, that hearsay evidence was improperly used, and that the examiner was guilty of prejudicial comments. Petitioner must be deemed to have waived such contentions by failure of timely objections. Moreover, we are persuaded by the record that no prejudice appears.

[9]There is no merit to petitioner's further argument that the State Bar, as a courtesy, should have contacted Bluestein just before beginning the hearing. At the time of the hearing, there was no attorney of record for petitioner. As previously indicated Bluestein for the first time informed the State Bar that he was representing petitioner two days *after* completion of the hearing.

lay by Dr. Kim in filing the complaint and also by the delay of the State Bar in processing the complaint. Neither of these contentions has merit.

Kim attempted at length to resolve his difficulties with petitioner through means other than complaining to the State Bar. The questioned transactions occurred in 1963; Kim negotiated with petitioner for return of his property in 1964; the civil suit was commenced by Kim in early 1965 and was not terminated until the end of 1969. Kim filed the complaint with the State Bar in the middle of 1970, only when it became apparent that petitioner was not going to pay the default judgment.

It is not unreasonable for a disgruntled client to attempt to resolve his differences with an attorney through a civil action before filing a complaint with the State Bar. (See Eschwig, v. State Bar, supra, 1 Cal.3d 8, 14-15, fn. 6) Petitioner failed to present any evidence in his defense in the civil action which involved the same course of conduct as in the case of the proceeding before the State Bar. Consequently, his claim that he was prejudiced by the deaths of three witnesses during the seven-year period before the filing of the complaint is entitled to little weight, and he has otherwise failed to demonstrate wherein any real prejudice lies.

There is no limitation period applicable to disciplinary proceedings before the State Bar; mere lapse of time is no defense unless *specific* prejudice is shown. (Lewis v. State Bar, supra, 9 Cal.3d 704, 713-714; Arden v. State Bar (1959) 52 Cal.2d 310, 316.)

Petitioner also claims that the charges should be dismissed since the State Bar failed to comply with its own rules by tardiness in processing Kim's complaint.[10] However, the failure to adhere to its rules does not deprive the State Bar of jurisdiction (Rules of Proc. of the State Bar, rule 20a), and dismissal of the complaint is not required without a showing of prejudice (Vaughn v. State Bar (1973) 9 Cal.3d 698, 702). Far from being prejudiced by these delays, petitioner was benefited. Although not specifically requested by petitioner the delays were required in order for the State Bar to arrange for a trial of the issues in petitioner's absence, necessitated by petitioner's election not to appear in person at the hearing. (See Geibel v. State Bar (1938) 11 Cal.2d 412, 416-417, cert. den. 305 U.S. 653, rhg. den. 305 U.S. 676.) As in the case of the claimed delay in filing the complaint, petitioner fails to make any real showing of prejudice.

Discipline

Petitioner finally contends that disbarment is too severe a punishment under the circumstances. Although we have the final word as to the discipline to be imposed (Glickman v. State Bar, supra, 9 Cal.3d 179, 184), the recommendation of the Board is given great weight. (Schullman v. State Bar, supra, 10

[10]Petitioner specifically claims there was no authorization for the delay in excess of 225 days between the time of filing the complaint and the issuance of the notice to show cause (see Rules of Proc. of the State Bar, rule 21a) or for the hearings being continued for more than a total of 90 days. (See Rules of Proc. of the State Bar, rule 34.)

Cal.3d 526, 540.) Petitioner has the burden of showing that the Board's recommendation is erroneous or unlawful. (Persion v. State Bar (1973) 9 Cal.3d 456, 461; In re Plotner (1971) 5 Cal.3d 714, 716; Mack v. State Bar (1970) 2 Cal.3d 440, 443; Sturr v. State Bar (1959) 52 Cal.2d 125, 127.)

Misappropriation of a client's property is a gross violation of general morality likely to undermine public confidence in the legal profession and therefore merits severe punishment. (Walter v. State Bar (1970) 2 Cal.3d 880, 891; In re Urias (1966) 65 Cal.2d 258, 262.) However, there are a number of mitigating factors in petitioner's case. He has no prior disciplinary record. (Bradpiece v. State Bar (1974) 10 Cal.3d 742, 747; Mrakich v. State Bar (1973) 8 Cal.3d 896, 907; Bernstein v. State Bar, supra, 6 Cal.3d 909, 918; Himmel v. State Bar (1971) 4 Cal.3d 786, 798; Yapp v. State Bar (1965) 62 Cal.2d 809, 818; Burns v. State Bar (1955) 45 Cal.2d 296, 303.) He has successfully continued his practice, albeit outside of the State of California, after the transaction in question without additional charges being lodged against him, and apparently has the confidence of his colleagues in his current practice. (See Bradpiece v. State Bar, supra, 10 Cal.3d 742, 747; Benson v. State Bar (1971) 5 Cal.3d 382, 388.) He has partially compensated his client for the loss by inducing the bank to release its claim on Kim's apartment building. Restitution of misappropriated property may be considered in setting the degree of discipline. (Bradpiece v. State Bar, supra, 10 Cal.3d 742, 748; Benson

v. State Bar, supra, 5 Cal.3d, 382, 388; Yapp v. State Bar, supra, 62 Cal.2d 809, 818; Burns v. State Bar, supra, 45 Cal.2d 296, 303; see Egan v. State Bar (1938) 10 Cal.2d 458, 461-462.) The delay in filing the complaint against petitioner may also be considered in mitigation of the punishment to be imposed. (See Vaughn v. State Bar, supra, 9 Cal.3d 698, 703; Arden v. State Bar, supra, 52 Cal.2d 310, 321.)

Present here are other factors which militate against leniency in petitioner's case. Petitioner appears unrepentant. This is evidenced not only by the fact that he has not made or offered to make full restitution to his client either to cover Kim's actual losses or to make payment of the $14,000 default judgment.

Further, he has failed to appreciate the seriousness of the charges in the instant proceeding or to comprehend the importance of participating in the disciplinary proceedings. Until recently,[11] petitioner has repeatedly declined to appear in California. The attitude of an attorney toward disciplinary hearings properly may be considered when deciding on the appropriate sanction. (Grove v. State Bar (1967) 66 Cal.2d 680, 684; see also Bradpiece v. State Bar, supra, 10 Cal.3d 742, 748; Benson v. State Bar, supra, 5 Cal.3d 382, 388.) Petitioner is also a member of the bars of Guam, Trust Territory of the Pacific, Okinawa and Japan, and he no longer practices in

[11]Petitioner first offered to come to California when presenting his motion for a hearing de novo, which was *after* the local committee had held its evidentiary hearing and made its findings.

California. Since his practice has not been directly affected by these proceedings he apparently finds little incentive to take them seriously.

In view of the totality of the foregoing matters, we order that petitioner make restitution to his former client and that he be suspended from the practice of law for five years or until he has made full restitution, whichever is the greater period. This order is effective 30 days after the filing of this opinion.

Exhibit B

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
June 5, 1974

I have this day filed Order
Rehearing Denied

In re: L.A. No. 30194

Yokozeki

vs.

State Bar of California

Respectfully,
G. E. Bishel
Clerk